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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

R5

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2005

WAC 98 116 53083

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO), in reviewing the petitioner's appeal, affirmed the director's decision in part and remanded the petition to the director for further consideration. The petitioner subsequently filed a motion to reopen, which was superfluous because the case was already open, owing to the remand order. The director approved the petition, but on further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition. Pursuant to the AAO's prior instructions, the director certified the decision to the AAO for review. The AAO affirmed the director's decision. The matter is now before the AAO on motion. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as a materials engineer consultant. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II classification. The director's initial denial evaluated the petition as a request for a national interest waiver of the job offer requirement.

On August 13, 1999, the AAO affirmed the director's national interest waiver analysis but noted that the petitioner had requested Schedule A, Group II classification, not a national interest waiver. The AAO determined that the beneficiary qualified for classification under section 203(b)(2) of the Act as an alien of exceptional ability as defined in the Citizenship and Immigration Services (CIS) regulation at 8 C.F.R. § 204.5(k)(3). The AAO remanded for two purposes: whether the petitioner had established its ability to pay the proffered wage and whether the beneficiary qualified for Schedule A, Group II classification defined by the Department of Labor at 20 C.F.R. § 656.22(d).[1]

On February 21, 2002, the director approved the petition. Upon review, however, the director determined that the petition was not approvable and issued a notice of intent to revoke on April 23, 2002. The petitioner responded and the director issued a final notice of revocation on May 30, 2002. The director certified that decision to the AAO and the AAO upheld the decision on February 27, 2003. The petitioner then filed the instant motion.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

In accordance with 8 C.F.R. § 103.4(a)(2), the petitioner responded to the certified revocation with additional evidence submitted to the AAO on June 25, 2002. The AAO considered that evidence in its 2003 decision and withdrew the director's finding regarding the petitioner's ability to pay the proffered wage. The petitioner also submitted a second response dated July 3, 2002. As noted on motion, the AAO failed to consider this response. Thus, we will reopen the matter for the limited purpose of considering the July 3, 2002 submission.

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[1] The AAO, in its February 27, 2003 decision, mistakenly cited 20 C.F.R. § 656.21a, a provision that relates cases filed for special handling, not Schedule A.

In his July 2, 2002 letter, counsel asserts that the AAO already found that the beneficiary is an alien of exceptional ability in its 1999 remand order. Thus, counsel concludes that the AAO determined that the record contains "substantial evidence that [the beneficiary] is qualified for pre-certification under Schedule A Group II." Counsel reiterates this claim on motion, asserting that the AAO has "reversed itself" by upholding the director's contrary determination.

Counsel acknowledges, in fact quotes, the AAO's 1999 discussion regarding the two "very different" standards for "exceptional ability." Specifically, the AAO noted that "exceptional ability" under 8 C.F.R. § 204.5(k)(3) is less stringent than the DOL standard for "exceptional ability" at 20 C.F.R. § 656.22(d). As quoted by counsel on motion, the AAO clearly stated, "an alien who meets [CIS'] definition of 'exceptional ability' may not meet the Department of Labor's definition of 'exceptional ability.'" While not quoted by counsel, the AAO subsequently stated very explicitly that it was not deciding whether the beneficiary meets DOL's standard, as the director did not address that issue. Specifically, on page 7 of the AAO's 1999 remand order, it stated:

> The remaining issue in this case concerns the application for Schedule A, Group II precertification. This office will offer no opinion with regard to this application because the director has made no initial determination with regard to the beneficiary's eligibility.

The AAO then specifically remanded the matter for a determination by the director regarding Schedule A, Group II, an action it would not have taken if it were making a determination on this issue. Thus, counsel's assertion that the AAO's 2003 decision is inconsistent with our 1999 decision is not persuasive. We will consider the evidence submitted in July 2003 below.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

> > (i) General. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application,

> or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The only issue in contention is whether the petitioner has established that the beneficiary qualifies for Schedule A designation. In order to establish eligibility for Schedule A designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor*. This petition seeks to classify the beneficiary as an alien with exceptional ability in business. The regulation at 20 C.F.R. § 656.22(d) provides:

> An employer seeking labor certification on behalf of an alien under Group II of Schedule A shall file, as part of its labor certification application, documentary evidence testifying to the *widespread acclaim and international recognition* accorded the alien by recognized experts in their field; and documentation showing that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision outlines ten criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.22(d), the evidence submitted to meet these criteria should reflect "widespread acclaim and international recognition." On motion, the petitioner submits evidence of the beneficiary's membership in the University at Buffalo Alumni Association and the American Society of Mechanical Engineers (ASME). The petitioner also submitted a letter from Dr. Harb Hayre, Director of C.E.I.E Specialists, evaluating the beneficiary's education, memberships and publication record. Dr. Hayre concludes that the beneficiary is "a metallurgical expert, with exceptional qualifications."

The regulation at 20 C.F.R. § 656(d)(2) requires documentation of the alien's membership in international associations, in the field for which certification is sought, *which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields*. Dr. Hayre describes ASME as "an international professional and technical society." He does not address its membership requirements. The materials on motion do not establish that either the alumni association, presumably open to all dues paying alumni, or ASME require outstanding achievements of their members as judged by recognized international experts in metallurgy.

The only other criterion addressed by Dr. Hayre is publication of scientific or scholarly articles in international professional journals or professional journals with an international circulation. 20 C.F.R. § 656(d)(6). The director concluded that the petitioner had not established that the beneficiary's articles were published in journals with an international circulation as required by this regulation. Dr. Hayre states that the beneficiary's work was published in "Chinese national journals whose quality of technical depth is often comparable internationally." This statement does not address the circulation of these journals.

The documentation submitted in support of a claim of Schedule A exceptional ability must clearly demonstrate that the alien has achieved widespread acclaim and international recognition. The record, however, stops short of elevating the beneficiary to having widespread acclaim and international recognition. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of February 27, 2003 is affirmed. The petition is denied.